



# **Slovenian Competition Day**

## **Recent remedies practice of the European Commission with a focus on remedies**

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# Outline

- **A. Introduction**
  
- **B. Remedy design**
  - **Basic conditions for acceptable remedies**
  - **Different types of remedies**
  - **When remedy discussions fail**
  
- **C. Buyer approval**



European  
Commission

## Why do Remedies Matter?

*Enforcement practice of the EU*

|             | <b>Notific.</b> | <b>Interv.<br/>(Rate)</b> | <b>Prohib.</b> | <b>Remed.</b> |
|-------------|-----------------|---------------------------|----------------|---------------|
| <b>2015</b> | 337             | 22 (7%)                   | 0              | <b>20</b>     |
| <b>2016</b> | 362             | 27 (8%)                   | 1              | <b>25</b>     |
| <b>2017</b> | 322             | 23 (7%)                   | 2              | <b>19</b>     |
| <b>2018</b> | 414             | 25 (6%)                   | 0              | <b>23</b>     |

Remedies are a fundamental instrument in the Commission's merger regime and enforcement practice

They generally constitute a proportionate solution to address competition concerns while maintaining the rationale of a transaction

In fact, remedies are the **main intervention tool** in the Commission's merger enforcement

## Legal Framework

- **Merger Regulation**
  - Articles 6(2) and 8(2) - clearance with commitments in phase I or phase II
  - Article 10 - extension of legal deadlines upon submission of commitments
- **Implementing Regulation**
  - Articles 19 and 20 - deadlines and procedure for submission of commitments
  - Annex IV/Form RM - information to be submitted simultaneously to commitments
- **Commission Notice on Remedies**
- **Judgments of Union Courts**
- **Standard texts for divestiture commitments**
  - Model text for divestiture commitments & Model trustee mandate
- **Other important sources of information**
  - DG Comp's Best Practices on the conduct of merger proceedings (paragraphs 33(a), 33(d), 33(e), 40, 41 – state of play meetings; guidance to parties on remedy proposals)

## Remedy design

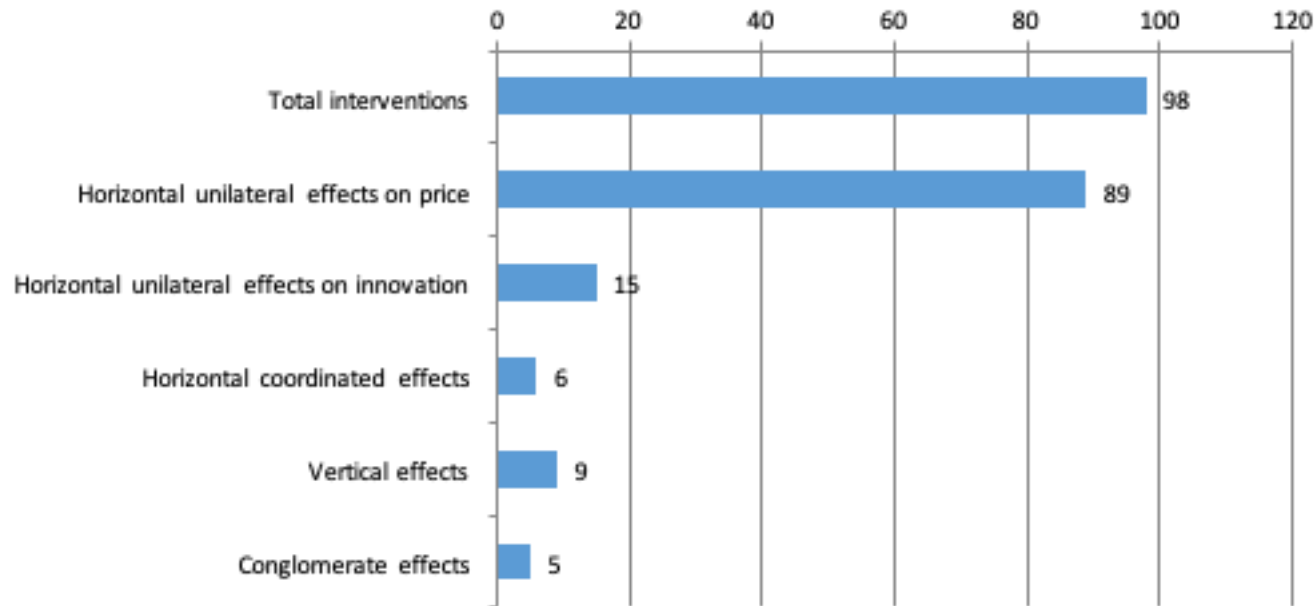
### Remedies must...

... eliminate competition concerns entirely

... be comprehensive and effective from all points of view

... be capable of being implemented effectively within a short period of time

## ToH: Interventions in the period 2015-2018 (98 cases)



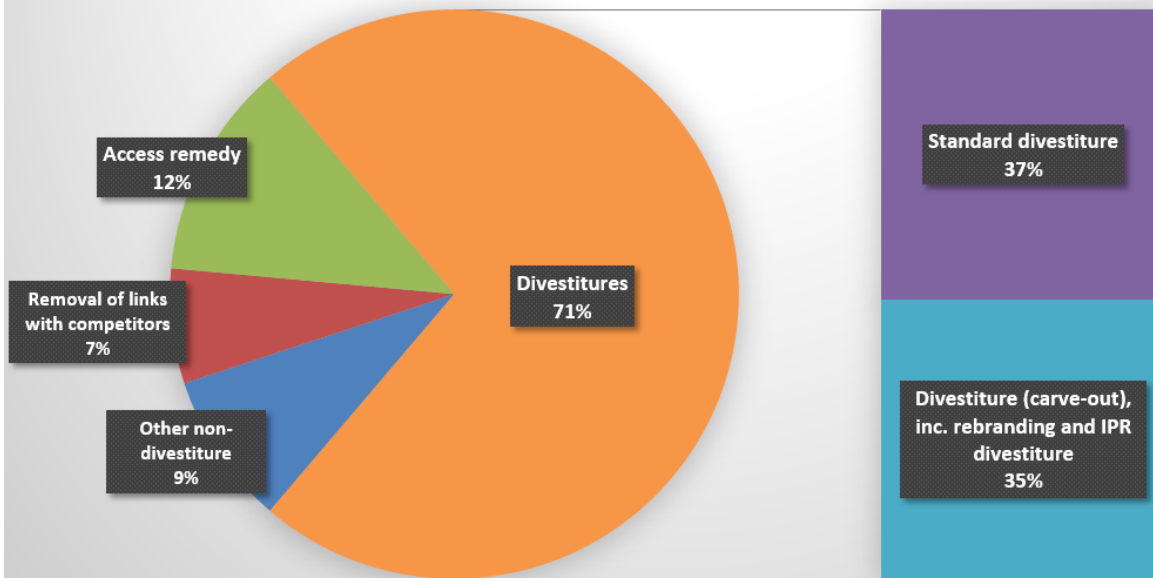
**Close link  
with the  
theory of  
harm**

## Different types of remedies

- (a) Divestiture of a viable and competitive** business (which may require divesting also activities in markets with no concerns or pipeline/R&D activities)
- (b) Removal of links with competitors** (e.g. divestiture of minority shareholding, termination of distribution arrangements)
- (c) Other remedies**
- **Access remedies** (eg: granting access to key technology/ infrastructure/ input on non-discriminatory terms)
  - **Other non-divestiture commitments/promises relating to future behaviour of merged entity**

# Commission enforcement practice

Types of remedies: 2011-18 (138 cases)



Clear preference for structural remedies

Divestiture of a stand-alone business is a norm

Openness to consider other/complex types of divestitures (carve-outs, re-branding, IPR divestiture) if appropriate safeguards

Access remedies in appropriate cases if as effective as structural remedies and if likely to be taken up



# Divestiture remedies

- i. Standalone business**
- ii. Carve-outs** (sale of parts of an existing business)
- iii. Reverse carve-outs** (the parties carve-out and keep limited parts of the divested business)
- iv. Divestiture of assets**, incl. IPR
- v. Re-branding**



# Praxair/Linde

## **Mergers: Commission clears merger between Praxair and Linde, subject to conditions**

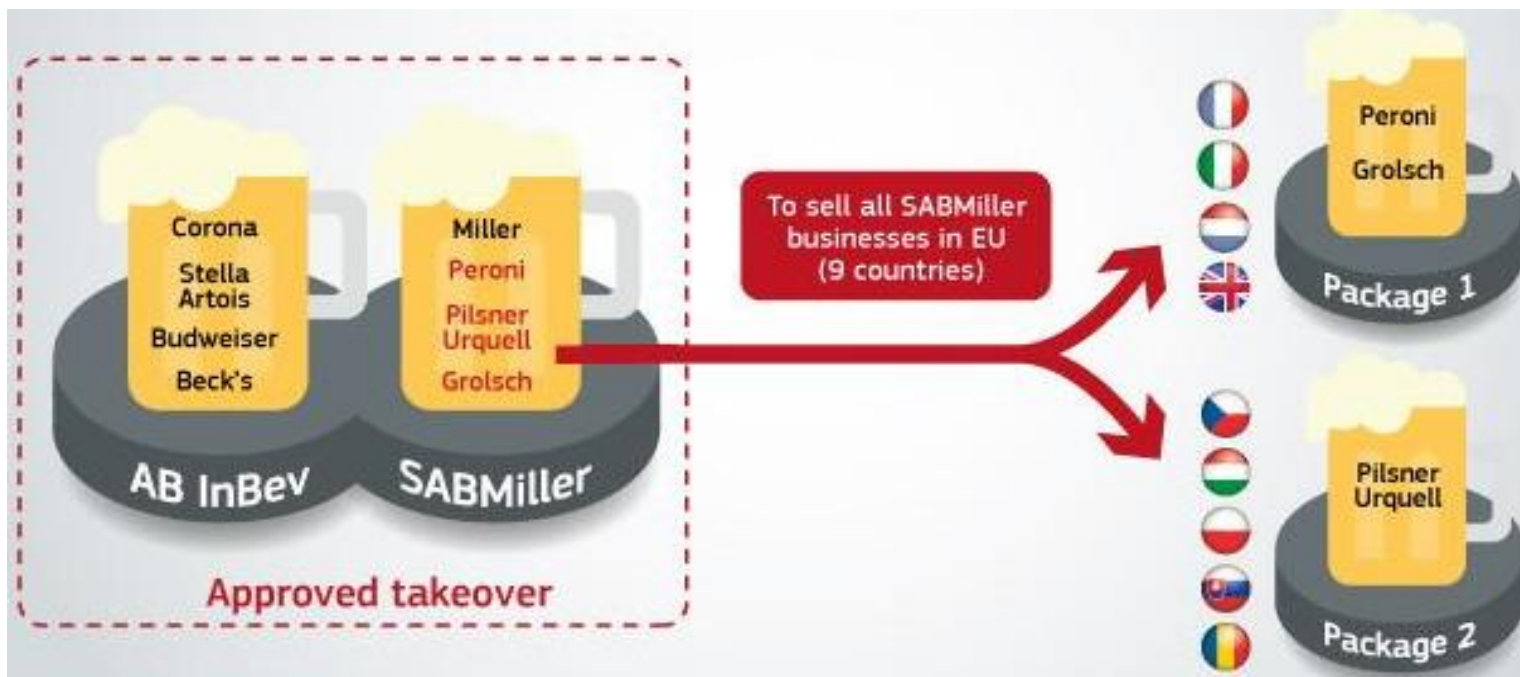
Brussels, 20 August 2018

**The European Commission has approved under the EU Merger Regulation the proposed merger between Praxair and Linde. The approval is conditional on the divestiture of an extensive remedy package.**

To address the Commission's competition concerns, Praxair and Linde offered the following commitments:

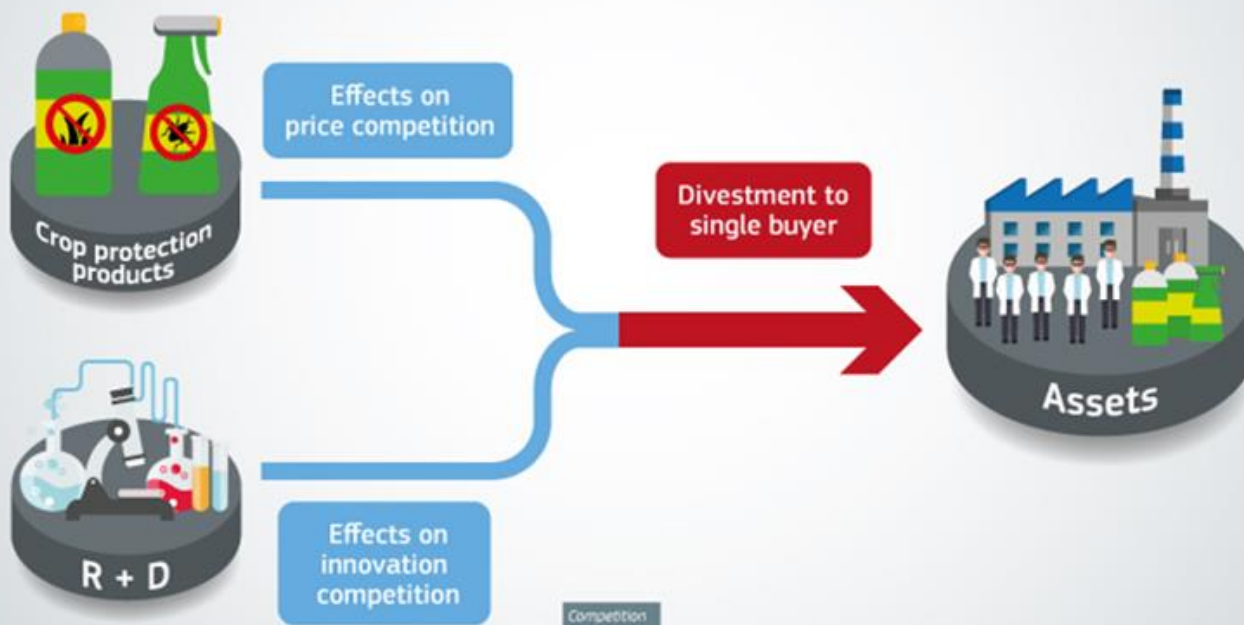
- The **divestment to a suitable purchaser of Praxair's entire gas business in the EEA**, including all relevant legal entities, assets and personnel. This divestment covers industrial, medical, specialty gases and helium. It also includes the helium sourcing contracts required to satisfy demand in the EEA;
- The **transfer of Praxair's stake in SIAD**, an Italian joint venture active in Central and Eastern Europe and in Italy, to Praxair's current joint venture partner Flow Fin, which will become the sole owner of SIAD;
- The **divestment of additional helium sourcing contracts**, beyond those needed to satisfy demand in the EEA, to one or more suitable buyers. This will ensure that the overall helium sourcing volume divested will address competitive concerns at the worldwide level.

# AB InBev/SAB Miller



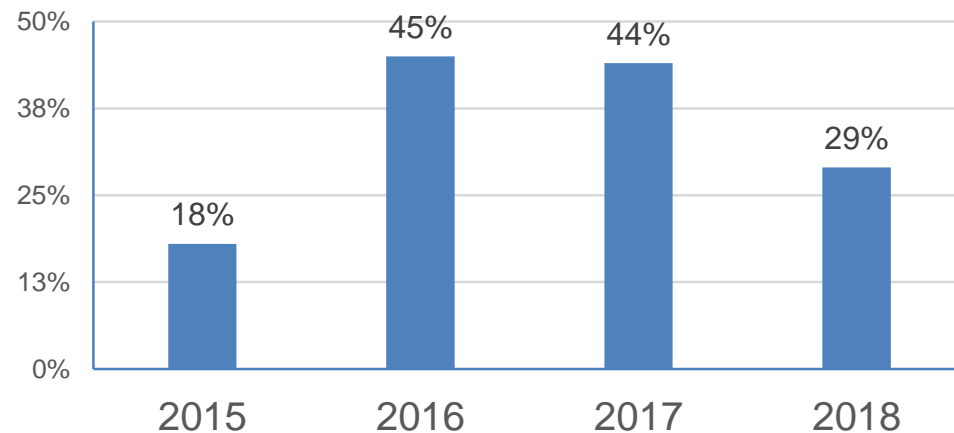
# Dow/DuPont

Commission ensures **DOW/DUPONT** merger preserves price and innovation competition in crop protection



## Implementation modalities

- **Standard:** Parties may close after the clearance decision without waiting for approval of buyer/agreements
- **Upfront:** Parties may not close until the Commission approves buyer/agreements
- **Fix-it-first:** Commission approves both the buyer and the agreements in the clearance decision

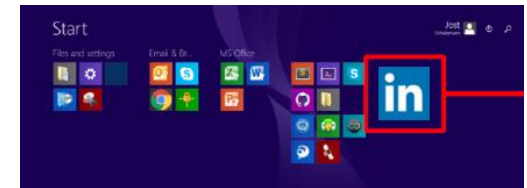


Percentage of remedy cases where the Commission required an upfront or fix-it-first remedy

# Non-divestiture remedy: Microsoft/LinkedIn

2 main forms of combination of Microsoft products with LinkedIn :

1. Microsoft would pre-install LinkedIn application on Windows PCs
2. Microsoft would integrate LinkedIn features into Office and start denying rival PSNs access to office APIs



## 1. Windows pre-installation remedies

- Allow OEMs/distributors not to install LinkedIn
- No retaliation / exclusive agreements with OEMs/distributors
- Allow end user to remove LinkedIn

## 2. Office integration remedies

- Continue to make available Office Add-in Program and APIs to competing PSNs
- Allow add-ins from other PSNs to run independently of LinkedIn
- Allow end user to disable LinkedIn features

# When remedy discussions fail

## Important factors

- Competition concerns remain unaddressed or addressed insufficiently
- There is a risk of dependence of the divestment business on the merging parties
- There are implementation risks, including due to complexities
- There are viability risks
- It is unlikely that suitable buyers will be found

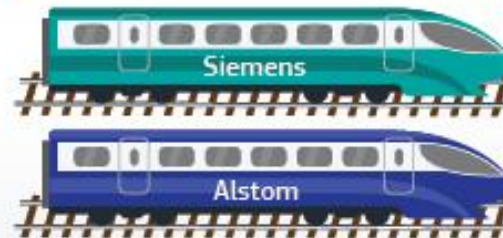
## Siemens/Alstom (1/2)

Commission prohibits **Siemens-Alstom** takeover to protect rail operators and passengers

Rail signalling systems are essential to prevent collisions and keep train and metro passengers safe



Very high-speed trains travel at 300 kilometres per hour or more and are important for the transition to environmentally sustainable transport



If combined, Siemens and Alstom would no longer compete resulting in higher prices, less choice and less innovation for rail operators



## Siemens/Alstom (2/2)

- **Mainline signalling**
  - **No clear-cut asset transfer**, complex mix of Siemens and Alstom assets, **no stand-alone and future proof business** to be used to effectively and independently compete against the merged company
- **Very high speed trains**
  - Divestment of an **unsuitable product**; the alternative licence Agreement did **not enable buyer to develop a competing high speed train** due to multiple restrictive terms and carve-outs



## Mergers: Commission prohibits Wieland's proposed acquisition of Aurubis Rolled Products and Schwermetall

Brussels, 6 February 2019

### The Parties' proposed remedies

Remedies proposed by merging companies **must fully address the Commission's competition concerns on a lasting basis**. While Wieland was ready to divest two Aurubis plants that manufacture rolled copper products in Stolberg and Zutphen, it was not willing to divest Aurubis' 50% stake in Schwermetall.

The Commission found that a remedy package without the stake in Schwermetall could not effectively address the competition concerns because:

- After a transitional period, the Stolberg and Zutphen plants would have lost access to the cost-competitive and high quality supplies of pre-rolled strip from Schwermetall. They would then no longer be able to recreate the competitive pressure that existed before the merger.
- It would not have addressed the concerns that Wieland, through the acquisition of Schwermetall, would have been able to raise smaller competitors' input costs and get access to confidential commercial information about these competitors.
- Wieland was not able to identify a suitable buyer for the Stolberg and Zutphen plants that could either convincingly show that it could compensate for the lack of access to pre-rolled strip from Schwermetall or that would not create new competition concerns.

The Commission consulted market participants about the proposed remedy. A majority of the market participants considered the remedy inadequate to address the serious competition concerns.

Therefore, the Commission concluded that the remedies offered by the companies **would not have dispelled its competition concerns**.

As a result, the Commission **prohibited the proposed transaction**.



## Mergers: Commission prohibits proposed merger between Tata Steel and ThyssenKrupp

Brussels, 11 June 2019

However, in this case, the remedies offered by the merging companies did not adequately address the Commission's competition concerns. In particular:

- In **metallic coated and laminated steel products for packaging**, the proposed divestment would only have covered a small part of the overlap between the merging companies. This was in particular the case for tinsplate, the most important packaging steel type in the EEA. Critically, the remedy proposal included no assets for the production of the necessary steel input to manufacture these products.
- In **automotive hot dip galvanised steel products**, the proposed divestment did not include adequate finishing assets capable of serving the customers in the geographic areas the merging companies mostly compete in. Moreover, the remedy proposal included no assets for the production of the necessary steel input to manufacture galvanised steel products for the automotive sector.

The Commission sought the views of market participants about the proposed remedies. The feedback was negative for both areas.

This confirmed the Commission's view that the remedies offered by Tata Steel and ThyssenKrupp were not sufficient to address the serious competition concerns and would not have prevented higher prices and less choice for steel customers.

As a result, the Commission has **prohibited the proposed transaction.**

# Buyer approval process (1/2)

- **Standard purchaser criteria (§17 Model Text):**
  - ✓ Independence
  - ✓ Financial resources
  - ✓ Proven expertise
  - ✓ Incentives to maintain and develop the divestment business
  - ✓ No *prima facie* competition concerns/risks of delayed implementation
- ‘Standard’ criteria **may be supplemented / tailored** to the specific needs of the particular case

## Buyer approval process (2/2)

The  
Commission  
will...

...examine the **Parties' reasoned proposal** and **Monitoring Trustee's reasoned opinion** as well as the share purchase agreement and ancillary agreements

...contact the proposed purchaser – to check ability and incentive to compete

...check *prima facie* competition problems & risks of delay

... ultimately approve or reject the buyer by reasoned decision that will be published

**Merger Advanced Search**

Case Notified Under:  Council Regulation 139/2004  Council Regulation 4064/89 ?

Decision Type:   
 (Council Regulation 139/2004) - Purchaser approval  
 (Council Regulation 139/2004) - Purchaser approval  
 (Council Regulation 139/2004) - Withdrawn  
 (Council Regulation 4064/89) - Aborted / withdrawn

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